

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :
CR-94-823 (S)

-against- United States Courthouse
: Brooklyn, New York

LEMRICK NELSON,
Defendant.

: August 20, 2003
Four o'clock p.m.

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TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE FREDERIC BLOCK
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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4 Proceedings recorded by mechanical stenography, transcript
5 produced by CAT.

6 THE CLERK: Criminal cause for sentencing: United
7 States versus Lemrick Nelson.

8 Docket No. CR-94-823 (S)

9 Parties, state your appearance for the record.

10 MS. RESNICK: Lauren Resnick, for the government?

11 MS. DUGGER: Christina Dugger, for the government.

12 MS. RESNICK: Good afternoon.

13 MR. QUIJANO: Peter Quijano for the defendant Lemrick
14 Nelson.

15 MR. JASPER: Richard Jasper.

16 MR. NEUMAN: James Neuman.

17 THE COURT: I think it would be good if you came up
18 close here and Mr. Nelson can stand with you or he can be
19 seated, whatever is most comfortable for him.

20 Mr. Quijano, even though you are surrounded by able
21 counsel, I will direct my comments to you in the first
22 instance. At any time any of your colleagues wish to address
23 the Court, just so indicate.

24 MR. QUIJANO: Yes, Your Honor.

25 THE COURT: Let's not have cross communication or
sudden interruptions.

1 MR. QUIJANO: I expect to be speaking for the Nelson
2 defense team.

3 THE COURT: There are two fine attorneys for the
4 government and I will direct my comments to you, Ms. Resnick.
5 No disrespect to Ms. Dugger. If she wants to comment at any
6 time, you indicate. There are no cross conversations. Okay?

7 MS. RESNICK: Yes.

8 THE COURT: Mr. Quijano, is your client prepared to be
9 sentenced today?

10 MR. QUIJANO: Yes, he is, Judge.

11 THE COURT: Have you shared with him the most recent
12 presentence report, I should state the most updated, which is
13 dated June 17, 2003.

14 MR. QUIJANO: We have and we have reviewed it with
15 him.

16 THE COURT: The prior presentence report was rendered
17 back on April 18, 1997 so in tandem they constitute the
18 collective presentence report before the Court.

19 MR. QUIJANO: That is our understanding also,
20 Your Honor.

21 THE COURT: Can you give the Court an appropriate
22 level of comfort that your client understands what is in the
23 report and you have discussed it fully with him and he has had
24 a fully opportunity to understand its contents?

25 MR. QUIJANO: We are fully competent.

1 THE COURT: As is my customary practice, let me
2 identify what is in the presentencing file in addition to the
3 underlying presentence reports which I just referred to,
4 which, once again, for the record constitutes the original one
5 back on April 18th, 1997 as well as the updated one of this
6 past June 17th, 2003. I have the following material that has
7 been submitted to me. Starting on June 15th, 2003 I have a
8 letter from the Bronx Judicial Community Relation Counsel --
9 everybody pay careful attention if there was anything that was
10 sent to me that didn't reach me.

11 MR. QUIJANO: Should we indicate we don't have a copy
12 of anything that the Court is referring to?

13 THE COURT: Let me know.

14 MR. QUIJANO: We don't have a copy of what the Court
15 just identified.

16 THE COURT: That is signed by Charles Landsberg. You
17 note what else you haven't seen and then we will take a moment
18 or so to read these. I will give you a chance to read these.
19 We have next the submission by the government dated June 18th,
20 2003 with Exhibits A through E annexed thereto. You have
21 received them?

22 MR. QUIJANO: Yes, Your Honor, we have.

23 THE COURT: Next I have a letter dated July 30th,
24 2003. That's two pages in length. It's a joint letter signed
25 on behalf of the American Jewish Congress, American Jewish

1 Committee, Anti Defamation League, Counsel for Jewish
2 Organizations, in City Service, Crown Heights Community Jewish
3 Counsel, Jewish Community Relations County of New York, Jewish
4 Board of Rabbis, Union of Orthodox Congregations, Institute of
5 Public Affairs, United Organization of Williamsburg, United
6 Synagogue of Conservative Religion. Have you seen that?

7 MR. QUIJANO: No, I have not.

8 THE COURT: Next, I have a letter from Mr. Roger
9 Bennett Adler, an attorney, dated August 5th, 2003
10 transmitting to me a copy of the family's sentencing
11 submission addressed primarily to the legal issue of whether
12 the sentencing court is authorized to impose a sentence in
13 excess of ten years, and that document is called Brief of the
14 Family of Yankel Rosenbaum Amicus Curiae. There is another
15 letter of transmission August 1, 2003. The brief is signed by
16 Nathan Lewin of the law firm of Lewin & Lewin, Washington,
17 D.C., have you received that?

18 MR. QUIJANO: Yes, we have.

19 THE COURT: Next I have a letter of August 8th, 2003,
20 from the esteemed law firm Mischle M-I-S-C-H-L-E Neuman and
21 Faughn signed by James E. Neuman, and that is on behalf of the
22 defendant. So, obviously, you have received that.

23 MR. QUIJANO: Yes, Your Honor.

24 THE COURT: And more important, has the government
25 received that ?

1 MS. RESNICK: Yes, Judge.

2 THE COURT: And also, I have the recent submission
3 from the government in response to the last referenced
4 document and that is a letter of August 14, 2003, signed
5 collectively by Ms. Resnick and Ms Dugger. Have you received
6 that?

7 MR. QUIJANO: We have, Your Honor. If we could
8 briefly address the documents we have not received?

9 THE COURT: Would you like a moment to read that?

10 MR. QUIJANO: I do not know if that is necessary. If
11 they don't enter into any legal issues such as the amicus
12 curiae, I don't believe we need to take time at this point to
13 read them.

14 THE COURT: Why don't I just for the sake of
15 completeness let you have a moment to look at them.

16 MR. QUIJANO: Certainly. Thank you.

17 (Pause in the proceeding)

18 MR. QUIJANO: Thank you, Your Honor. We have no
19 additional comment at this time regarding these two documents.

20 THE CLERK: Shall I show it to the government?

21 THE COURT: Yes, show it to the government.

22 (Mr. Innelli handing to Ms. Resnick)

23 (Pause in the proceeding)

24 MS. RESNICK: Thank you.

25 THE CLERK: You are welcome.

1 THE COURT: All right. Are we ready to proceed,
2 Mr. Quijano?

3 MR. QUIJANO: Yes, Your Honor.

4 THE COURT: All right. Now, let me advise you that I
5 have a recommendation from the probation office, and I want to
6 share that with you just so you are advised what the probation
7 department has submitted to me in terms of the recommended
8 sentence.

9 One hundred twenty months of imprisonment. That's
10 the statutory maximum, followed by three years supervised
11 release, with a number of special conditions. They recommend
12 substance abuse treatment, that the defendant shall not
13 possess weapons, including knives, razors, box cutters or any
14 such sharp weapons and a search condition, and of course, \$50
15 special assessment which is required by law, and the proposed
16 model search condition, and also recommend that no fine be
17 imposed because the defendant does not have the ability to pay
18 a fine. And also, that during the period of supervised
19 release, the defendant be prohibited from possessing a
20 firearm. That's basically what probation has said.

21 Now, Mr. Quijano, let's make our sentencing
22 calculations at this time. In that respect, let's turn to the
23 most recent update from the probation office, and let's turn
24 to page three. Let's start with the base offense level.

25 Does either side take any issue with the recommended

1 base offense level of 15 as contained in paragraph seven of
2 the updated presentence report?

3 First the government?

4 MS. RESNICK: No, Judge.

5 MR. QUIJANO: No, Your Honor.

6 THE COURT: Just for the record, that's based upon the
7 use of guidelines to 2H1.3A, and based upon the offense of
8 conviction we turn to that guideline which is labeled use of
9 force or threat of force to deny benefits or rights in
10 furtherance of discrimination; damage to religious real
11 property. It speaks in terms of a base offense level of ten if
12 no injury occurred, which is not this situation; 15 if injury
13 occurred, which is this situation; or two plus the offense
14 level applicable to any underlying effects. So we then are
15 relegated to what is the most comparable underlying offense,
16 and we agree that it is aggravated as set forth in 2A2.2. I
17 know this sound s like a lot of numbers and it is very
18 difficult for lay people to understand the intricacies of our
19 sentence, but nonetheless, that is the law that Congress has
20 given to us that we are to apply.

21 The aggravated assault provides for a base offense
22 legal of 15 and then provides that if a firearm was discharged
23 increase by five. If a dangerous weapon, including the firearm
24 was otherwise used, increase by four levels. So now we have a
25 specific offense characteristic that requires us to increase

1 by four levels because of the fact that we do have a dangerous
2 weapon in the personage of the knife. So we agree that the
3 four levels are to be added to 15 level base offense level?

4 MS. RESNICK: Yes.

5 MR. QUIJANO: Okay.

6 THE COURT: That brings us to another specific
7 offense characteristic that is set forth 2A2.2(b)(3)(c). If
8 the victim sustained bodily injury we are to increase the
9 offense level according to the seriousness of the injury. In
10 this case the defendant's actions caused permanent or life
11 threatening or bodily injury which requires a six level
12 increase, and we are in agreement with that, I suspect, as
13 well.

14 MR. QUIJANO: Yes.

15 MS. RESNICK: Correct.

16 THE COURT: We are advised under another section of
17 2A2.2 that the cumulative adjustment for the two specific
18 offense characteristics that we just identified are not to
19 exceed nine levels. Since they do add up to ten levels, we
20 have to subtract one level. Now we go to 2H 1.3A3 which
21 requires us to add two levels because it provides that we are
22 to have 2 plus the offense level applicable to any underlying
23 offense. We are in agreement with that I take it as well,
24 correct?

25 MR. QUIJANO: Correct.

1 THE COURT: Now we come to one that the parties have
2 taken issue with in terms of whether the Court should or
3 should not apply an additional level of two points for
4 obstruction of justice.

5 The presentence report recommends it and at this time
6 I will allow counsel to comment about it since we take issue
7 with its application.

8 MR. QUIJANO: So it is clear for the record, our
9 objection is not only to the guideline calculation, but also,
10 as an objection to one of the grounds the government has
11 raised in its request that the Court upwardly depart to this
12 extraordinary maximum of ten years.

13 THE COURT: We are not up to upward departure yet.

14 MR. QUIJANO: The argument in terms of an obstruction
15 of justice will be the same at least in terms of our position
16 regarding this.

17 THE COURT: On a previous occasion I gave the parties
18 specific notice that the Court was contemplating an upward
19 departure here. So the parties have been put on notice for
20 some time. Go ahead.

21 MR. QUIJANO: If the Court will bear with me, most of
22 my comments are directed to the myriad instances listed by the
23 government. First as to the alleged false testimony during the
24 State's suppression hearing. Your Honor, for the Court to
25 impose such a departure it must find that the State's conduct

1 in question must have an actual effect on the federal
2 proceeding. Obviously, there is no basis whatsoever to
3 conclude that alleged perjury by the defendant during the
4 State suppression hearing was material to the federal action
5 or had any discernible impact on the investigation or
6 prosecution or trial of this matter.

7 THE COURT: But certainly it had an influence on the
8 evidentiary ruling as to whether to allow the prior assertion
9 of fact by counsel at the prior proceeding into evidence in
10 this proceeding, so certainly I had to spend time, conduct a
11 separate hearing, and to make a determination on that
12 evidentiary issue. Doesn't that have a direct effect upon
13 this proceeding?

14 MR. QUIJANO: I think the focus should be exactly on
15 the McKeon aspect. Certainly, the government has raised that
16 as a discrete independent ground. We believe it certainly
17 should be treated separately. However, in terms of the current
18 federal law, it's clear that before the Court could upwardly
19 depart or even grant the two point enhancement for obstruction
20 of justice for the State proceeding, there has to be in the
21 language of the cases a discernible impact. While it may have
22 been related in this Court's eventual determination on the
23 McKeon issue, I don't think it would be a fair
24 characterization to say that testimony of the Supreme Court
25 hearing, which certainly was not directly at issue on McKeon,

1 would have a direct impact on this. We are also limited, as
2 the Court noted, we were limited in all of the allegations or
3 discussions at the McKeon hearing and suggested the State
4 proceedings because prior counsel in that matter was deceased,
5 was not able to provide the Court or the parties with any
6 position in terms of his recollection.

7 THE COURT: Well, you are talking about only the
8 State proceeding.

9 MR. QUIJANO: Only about the State.

10 THE COURT: I am talking about the federal trial
11 before Judge --

12 MR. QUIJANO: No. I am talking about the State
13 proceeding where Mr. Lewis represented the defendant. At any
14 rate, our position simply is there was no sufficient
15 discernible impact on federal investigation prosecution or
16 trial by the alleged -- and I repeat -- alleged misstatement
17 or perjurious testimony during the Supreme Court hearing. The
18 government also contends that during a prior federal trial
19 before Judge Trager, Mr. Nelson obstructed justice in several
20 ways. In addition, the government suggests Mr. Nelson
21 obstructed justice during the McKeon hearing. We simply
22 submit each of these arguments is without merit. Let me
23 quickly go to the McKeon issue.

24 THE COURT: Slow down and take your time.

25 MR. QUIJANO: We stated our position at trial that

1 Mr. Nelson testified truthfully at the McKeon hearing. The
2 government in its latest submission suggested that we
3 conveniently omitted a portion of the transcript where prior
4 counsel gave a rambling description of what he knew and when
5 he knew it. We remind the Court of the sequence of events
6 during the colloquy between the Court and prior counsel. It
7 certainly seemed apparent to us that the Court was not
8 satisfied with prior counsel's initial explanations to the
9 Court's questions. Indeed, we submit that the transcript
10 clearly shows that when the Court focused on prior counsel by
11 posing direct questions on the issue, prior counsel said he
12 cannot recall whether Mr. Nelson had, as he claimed, told him
13 that he had stabbed the victim. Now, notwithstanding -- and
14 it is rather difficult to believe an attorney would have no
15 recollection either way with regard to such a salient matter
16 as whether his client told him whether he had or had not
17 stabbed the man he's accused of killing, especially given the
18 circumstances surrounding this case, the fact of the matter
19 remains, Your Honor, that Mr. Nelson's testimony was not
20 directly inconsistent with prior counsel's. Of course, we
21 found it significant that this Court during the McKeon
22 hearing, once it had reflected and changed its initial
23 position, still did not find Mr. Nelson's testimony as
24 perjurious. Accordingly, we respectfully submit that before
25 this Court could base an upward departure upon a premise that

1 Mr. Nelson committed perjury during the McKeon hearing, we
2 respectfully submit further findings of fact would be
3 necessary. And of course, it follows that before the Court
4 could make those additional findings of fact, the defendant
5 would be entitled to a Fatico hearing where he will be
6 permitted to present witnesses which we offered to do during
7 the initial McKeon hearing and where counsel would finally be
8 permitted to cross-examine Mr. Nelson's prior counsel under
9 oath.

10 With regard to basing the departure based on
11 defendant's statement during the sentencing before
12 Judge Trager which the government raises in its moving papers,
13 as we stated in our moving papers, it was not made to a
14 probation officer during a presentence investigation, nor was
15 it a sworn statement during sentencing. As noted in
16 application note 5B, section 3C1.1, the making of false
17 statements not under oath to law enforcement officers does not
18 warrant an application of this --

19 THE COURT: The statement was made to Judge Trager.

20 MR. QUIJANO: The government in its most recent
21 papers point to section 4F, the application note to that
22 section, as indicating that would permit this Court to impose
23 the enhancement as a result of a false statement to a judge.

24 We remind the Court, however, that the Second Circuit
25 has stated in United States versus Johns that an unsworn

1 denial of guilt, even a false and material unsworn denial of
2 guilt, cannot become the predicate of obstruction of justice
3 enhancement, and we believe given those two application notes
4 where they are placed, they recognize the distinction between
5 a false statement to a judge and a false statement under these
6 circumstances which could readily be characterized as an
7 unsworn denial of guilt.

8 The same --

9 THE COURT: I am sorry. I didn't mean to interrupt.

10 MR. QUIJANO: The same reasoning is applicable with
11 regard to the suggestion that the departure is warranted as a
12 result of his prior counsel's cross-examination of Ms. Shaw or
13 his arguments during closing.

14 Section 3C1.1 is not intended to punish a defendant
15 for the exercise of his constitutional right to cross-examine
16 witnesses.

17 The base enhancement as a result of counsel posing
18 questions on cross-examination would surely then be denial of
19 his Sixth Amendment rights. Indeed, as Justice White noted in
20 United States versus Wade, more often than not, defense
21 counsel will cross-examine a prosecution witness and impeach
22 him if he can even if he thinks the witness is telling the
23 truth.

24 Surely, zealous cross-examination can never be the
25 equivalent of suborning testimony. Of course, the government

1 fails in its papers to demonstrate how the cross-examination
2 of Ms. Shaw was misleading, let alone, explain why Mr. Nelson
3 should be held responsible for his prior counsel's tactics.

4 THE COURT: I am not going to base my determination
5 on the questioning of Ms. Shaw. I am going to focus on the
6 so-called McKeon hearing.

7 MR. QUIJANO: Let me reiterate what I said. We
8 believe based on the status of the current record, if the
9 Court were going to grant a departure based on the McKeon
10 hearing, given the fact that even though the defendant through
11 counsel requested an opportunity to call witnesses at that
12 time, even though the defendant through counsel requested over
13 and over again, once the Court had reversed itself for an
14 opportunity to confront prior counsel, we believe in all
15 fairness, before the Court could proceed, additional findings
16 of fact would have to be made, which would require a Fatico
17 hearing where we will be given that opportunity.

18 Certainly, there are other grounds and other issues
19 for this Court to decide this afternoon. I am cognizant of
20 rule 32 which certainly, at least for the departure purposes,
21 provides a vehicle where if the Court does not need to reach
22 or make a finding of fact as to a particular issue that's in
23 dispute, it need not rule. Obviously, that does not answer the
24 two point enhancement in terms of the guidelines calculation.

25 THE COURT: I am not going to base any of the

1 departure on the obstruction of justice, although arguably I
2 could go in that direction. So you are advised you don't have
3 to talk about the things which won't be relevant.

4 MR. QUIJANO: That is comforting.

5 THE COURT: Ms. Resnick, do you wish to make comment
6 before I make my ruling?

7 MS. RESNICK: With respect to the two point
8 enhancement based on McKeon, the testimony of this defendant
9 at that McKeon hearing was directly contradicted by the
10 testimony of his prior lawyer Trevor Headley who specifically
11 said despite the fact that the defendant gave him a narration
12 of the defendant's -- of the night in question, he did not
13 tell him that he had stabbed Yankel Rosenbaum, and the first
14 time Mr. Headley learned of that fact of that admission on the
15 part of the defendant was after the conclusion of the first
16 federal trial. The Court held a lengthy ex parte hearing.
17 The Court made credibility findings that were clear and
18 explicit, finding this defendant's testimony at that hearing
19 under oath incredible. Those findings are more than
20 sufficient based on that factual record to give the two point
21 enhancement based on the McKeon hearing.

22 THE COURT: Now, I agree with that position. If the
23 so-called McKeon hearing -- we all understand what we mean by
24 that. What we mean by that is that it was a very important
25 part of the trial. We had to impose upon the jury for a

1 sustained period of time while we conducted an in camera
2 proceeding because the position of the defense had radically
3 changed from the prior federal trial and it was a profound
4 change and it required the Court to spend a considerable
5 amount of time and energy and stay up basically the entire
6 night after I made my initial determination reflecting and
7 thinking about it over and over again until I decided that the
8 right decision was the one I made the following morning.
9 There is no question about the materiality. I had to instruct
10 the jury as to whether that assertion by counsel at the prior
11 trial would be permissible in evidence in this proceeding. So,
12 certainly, what transpired during the in camera McKeon hearing
13 was material to what I had to address in the course of the
14 proceeding. At the time I made my determination at the
15 so-called McKeon hearing I did not have available to me the
16 minutes of the sentencing proceeding before Judge Trager. I
17 tried to get a copy of the minutes. Either they weren't
18 transcribed or I could not locate them under the time
19 constraints that I had to deal with at this time. I
20 subsequently had seen them. I made that determination at the
21 end of the McKeon hearing and I will now consistent with that
22 make the following findings with respect to the obstruction of
23 justice, which I am obliged to make.

24 I find by the preponderance of the evidence and
25 during the McKeon hearing the defendant falsely testified that

1 he told his defense attorney who first tried this case Trevor
2 Headley -- what I mean by that was that he tried this case
3 during the prior federal proceeding. That's all I based it
4 on. I didn't take into consideration what happened during the
5 State proceeding. Anyway, that he falsely testified that he
6 told Mr. Headley that he did not stab Yankel Rosenbaum. I
7 listened very carefully to Mr. Nelson's testimony at the
8 hearing as well as to Mr. Headley and they both testified
9 under oath, and I concluded that Mr. Headley's testimony was
10 credible, and that the defendant's testimony was not credible.

11 Now, having looked at the sentencing minutes before
12 Judge Trager, I find my assessment of the credibility,
13 reinforced and emboldened actually by what Mr. Nelson said to
14 Judge Trager, which just belies his claim that he did tell Mr.
15 Headley that he did not stab Yankel Rosenbaum, and I point
16 specifically to Mr. Nelson's comments at the sentencing
17 proceeding before Judge Trager as follows:

18 "Mrs. Rosenbaum, I sympathize with you for the loss
19 of your son but I didn't have no actions. I had no part of
20 it."

21 So that is a radical change from the trial to
22 reinforce the credibility determination that I made at the
23 conclusion of the hearing.

24 So I find in regard to the statement that was made at
25 the McKeon hearing by Lemrick Nelson that he willfully made a

1 false statement and that his false statement was, indeed,
2 material to this present trial before me.

3 I view it as a perjury even though I don't think I
4 have to characterize it as such to accommodate the
5 requirements of 3C1.1 which sets forth a non-exhaustive
6 listing commission of perjury in subdivision 3B, but also
7 provides in subdivision 3F that it is obstruction of justice
8 if somebody provides materially false information to a judge
9 or magistrate, and I don't see where an oath or finding of
10 perjury is necessary when somebody is speaking and providing
11 information to a judge or a magistrate, and case law supports
12 that in my opinion. But in any event, whether you view this
13 as subdivision F or subdivision B, my finding is clearly made
14 that there was here the willfully making of a false statement
15 by Mr. Nelson that was material to this case. So the two
16 levels for obstruction of justice will be added to the
17 calculation of our total offense level.

18 Now, that brings us to an adjusted offense level of
19 28, and there is no other adjustment that I can glean from any
20 papers in front of me. So that gives us a total offense level
21 of 28. We have and agreed, I guess, with the criminal history
22 category of two. There is no question about that.

23 MR. QUIJANO: Correct.

24 THE COURT: The upward departure under the sentencing
25 we are talking about is from the range of imprisonment of 87

1 to 108 months.

2 Now, we specifically come to the issue of upward
3 departure and I put everybody on notice that I was going to
4 consider that. I gave everybody an opportunity to be heard.
5 Is there anything further you wish to address in respect to
6 that in addition to what you have already said?

7 MR. QUIJANO: We are now turning to the other
8 grounds, death results?

9 THE COURT: Yes.

10 MR. QUIJANO: So I am clear, this would be the only
11 ground that the Court would be considering, not the other
12 grounds raised by the --

13 THE COURT: Yes, I am going to base my determination
14 on the issue of death resulting.

15 MR. QUIJANO: Very well. If the Court pleases, then,
16 where section 5k1.2 does permit a departure where death
17 results from the crime this Court may only depart if the
18 conduct has not already been accounted for elsewhere in the
19 calculations. To do otherwise would result in impermissible
20 double counting and is clearly prohibited by the guidelines.
21 While the probation office -- now all parties agree that the
22 current level after the necessary enhancements is a level 28.
23 To get to that the guideline calculations require an increase
24 of six levels for permanent or life threatening bodily injury
25 pursuant to 2A2 .2. Your Honor, it's defendant's position that

1 that enhancement overlaps and accounts for the same punishment
2 as would result from a departure based on result in death
3 since it is clear that both would arise from the same conduct
4 regardless of what it's called or characterized as, that is,
5 the attack in the stabbing of Mr. Rosenbaum. I think it might
6 be instructive and helpful for the Court if I read some of the
7 actual language of 5k2.1 which indicates certain factors that
8 a sentencing court should consider in the determination
9 whether this enhancement is warranted.

10 It reads in part:

11 That matters that would normally distinguish among
12 other levels of foresight, such as defendant's state of mind
13 and the degree of planning and preparation, other appropriate
14 factors or whether multiple deaths resulted, and the means by
15 which the life was taken.

16 Your Honor, this court is intimately familiar with
17 the facts which were elicited during this trial. It is
18 intimately familiar with the circumstances of what took place
19 August 19th, 1991 and more specifically, in relation to the
20 conduct of our client in the act that he undertook that night.
21 Needless to say, there is no question, this is not multiple
22 homicides. Needless to say, there is no question this was not
23 a lying in wait or particularly heinous matter that was
24 planned. It was completely unplanned. It was a riotous and
25 chaotic situation that arose from a tragic accident where an

1 entire community rose up. Simply put, Your Honor, I don't
2 think it is fair to try and characterize whatever Mr. Nelson
3 did, as inexcusable as it was and as tragic as the results
4 were, I don't think it is fair to try and characterize it as
5 fitting within the language of 5k2.1. More importantly,
6 perhaps, in terms of what this Court is permitted to do and
7 prohibited from doing pursuant to the guidelines is the fact
8 that this Court cannot engage in double counting.

9 The government responded in their papers. Let me
10 address that. It seems to me that it might be instructive for
11 the Court to consider the way a different section in the
12 guidelines is addressed in terms of dealing with the other
13 conduct in other situations. I refer to 5G1.3 which deals
14 with consecutive and concurrent sentences when a district
15 court is forced to sentence someone for a federal matter where
16 there is a prior state sentence. The application notes in that
17 guideline in the cases that have evolved from that make clear
18 that the court must sentence a defendant to consecutive time
19 when the conduct for which he's been sentenced in the prior
20 state sentence arises or is essentially the same conduct.

21 I submit that's what's going on in this situation. In
22 other words, by the Court's guideline calculations in 2A2.2,
23 it has already taken into effect, into consideration precisely
24 the same conduct that the government now chooses or asks that
25 this Court upwardly depart, and that is, the death which

1 resulted.

2 THE COURT: All right. Does the government wish to be
3 heard?

4 MS. RESNICK: Yes. Under the defense suggestion that
5 Yankel Rosenbaum's death which was caused by wounds inflicted
6 by the hand of this defendant to his torso, which punctured
7 his lungs and resulted in his death is fully accounted for by
8 an enhancement for serious bodily injury is plainly wrong both
9 on the law and on the facts. And as a basic moral matter, the
10 permanent loss of a victim's life is far more devastating to
11 that victim and the victim's family than that and not that
12 that victim could have otherwise survived. This Court may and
13 should find, we respectfully submit, by a preponderance of the
14 evidence which is standard for sentencing before this Court
15 that this defendant's conduct resulted in Yankel Rosenbaum's
16 death, and this Court should thus sentence this defendant
17 based upon the actual and real consequences of his actions
18 which was the loss of life of a completely innocent man. The
19 suggestion that a serious bodily injury enhancement covers or
20 accounts to -- fully accounts for that death is unacceptable
21 as a matter of law and as a matter of fact. And we submit to
22 the Court, as we did in our papers, that the guidelines
23 expressly and clearly and in a very straightforward way apply
24 this kind of an application for an upward departure under the
25 circumstances just as in this case.

1 THE COURT: All right. Now, Mr. Quijano, in response
2 to your legal arguments, since we are constrained to apply the
3 aggravated assault guideline, we have added six levels because
4 the guideline which speaks in terms of bodily injury talks
5 about adding six levels of permanent or life threatening
6 bodily injury. What is painfully absent from that guideline is
7 any distinction between permanent or life threatening bodily
8 injury on the one hand, and death resulting on the other. So
9 it seems to me that if I make this finding, which I will rule
10 on shortly, that clearly the death of Yankel Rosenbaum was not
11 taken into consideration in the aggravated assault sentencing
12 guideline. It is a factor that is not accounted for at all,
13 let alone appropriately or fully accounted for. I just want
14 to respond to you on the issue of law.

15 The sentence that I will render will also include my
16 determination on the issue of departure -- upward departure.
17 I think before I make that determination I should give
18 Mr. Nelson an opportunity to speak to me, since it does affect
19 the sentence and I will do it at that time after I hear him.
20 Is there anything else you wish to add at this time?

21 MR. QUIJANO: Only procedural. The government also
22 made myriad requests for additional conditions of supervised
23 release.

24 THE COURT: We will get to that.

25 MR. QUIJANO: I see.

1 THE COURT: Also a sentencing matter but you can
2 address it now. What I want you to do is I want us to discuss
3 everything that counsel wishes to discuss before I render my
4 decision. I want to address Mr. Nelson before I do that. So
5 let's move on now. Let's move on now to what you may have to
6 say about conditions of supervised release.

7 You don't have to be overly extensive because I am
8 not inclined to impose a curfew or to restrict Mr. Nelson's
9 right to look at television or things of that nature, but I
10 will give the government an opportunity to speak to that also.

11 MR. QUIJANO: We appreciate the Court's guidance and
12 just so I am clear, if the Court at this point is not inclined
13 to impose an additional condition of supervised release, nine
14 o'clock curfew or the area dealing with either freedom of
15 association or what he can view, possess, the government also
16 asks for, I think, what was described as intensive or
17 supervision by the intensive supervision unit. We don't
18 believe that's appropriate. We believe that is a matter left
19 for probation. I can go into detail, unless the Court --

20 THE COURT: Let me tell you what I am contemplating.
21 I am contemplating the use of our community confinement
22 facility, our halfway house, as a condition of supervised
23 release. I think it is particularly appropriate here and I
24 want to share that with you, so you can address it. But in
25 that respect I have reached out to the community confinement

1 people and I am thinking in terms of rehabilitation now as
2 part of supervised release. I think it is necessary here.

3 MR. QUIJANO: I'm a little confused. Is the Court
4 considering it as --

5 THE COURT: We are talking about possible conditions.

6 MR. QUIJANO: After he was released from prison?

7 THE COURT: That is when supervised release --

8 MR. QUIJANO: I never heard of a halfway house. I
9 had heard it in a different context but --

10 THE COURT: And I have done some research. I visited
11 our local halfway house in Brooklyn and I was very impressed
12 with the fact that the orientation there as well as they try
13 to provide some structure, provide some necessary supervision
14 to assist in adjustment to the outside world and of particular
15 importance, they are geared to assist people in gaining
16 employment. They have a list of people that they deal with who
17 are inclined to allow those such as Mr. Nelson to have
18 employment opportunities. They aid in employment searches.
19 They allow them to leave the facility to seek employment and
20 indeed, to work. The legal resource guide to the Federal
21 Bureau of Prisons speaks of community confinement centers as
22 follows: To assist offenders "and in finding a job." Very
23 important for Mr. Nelson here locating a place to live. That
24 may or may not be more or less important. He is not going to
25 be living with his family. I think there is some reference to

1 a parental sister that may provide a home for him and
2 reestablishing family ties. The guide also says that every
3 offender placed in a CCC is provided with structured programs,
4 job placement service and counsel, and closely monitor that,
5 monitored activities, inmate programs, individualized and
6 tailored to program needs of the offender being aware of the
7 importance to everybody considering the sentence. I, in
8 addition to relying upon that guide, spoke to the community
9 corrections manager of the Federal Bureau of Prisons and asked
10 specifically what experience they have had in terms of what's
11 the most effective period of time for somebody to avail
12 themselves of these rehabilitative opportunities that exist
13 when somebody gets out of jail and Mr. Menkel (ph) advised me
14 that this type of supervised release should be for at least
15 six months in order to maximize the benefits associated with
16 the available programs.

17 Also, being mindful of how important it is to try to
18 tailor make this rehabilitation, the best benefit,
19 Mr. Menkel, also advised me that there is a comprehensive
20 sanction center, I think it is located in New Jersey, that
21 offers particular types of programs which may be something
22 very reasonable for Mr. Nelson. Specifically Mr. Menkel
23 advised me it offers life enhancement skill classes at this
24 particular center, maintains close contact with the probation
25 office when making programming decisions.

1 In short, by the way, that community action center is
2 located in Newark, New Jersey. What I am trying to impress
3 upon you, Mr. Quijano, is that I do think Mr. Nelson needs
4 this type of assistance for his rehabilitation. He needs an
5 opportunity to meet with people who will try to get employment
6 for him. He needs an opportunity to work in a structured
7 environment. He needs an opportunity to improve his life
8 skills. He has had some problems in this respect as you know
9 over the years.

10 Now, the reason why I mention this is because in
11 fairness to you and to Mr. Nelson, I want to let you know the
12 efforts I have made in terms of the rehabilitative aspects of
13 the sentence. So you can comment, if you like, with respect
14 to that. I find that to be more essential than perhaps a
15 curfew at nine or eight or ten or restricting his so-called
16 constitutional rights to associate. I think he needs this type
17 of supervision. So you can comment about that or anything else
18 at this time.

19 I turn to the government before I turn to Mr. Nelson.

20 MR. QUIJANO: If Your Honor pleases, I am sure I
21 speak for Mr. Nelson as well as all of us in our appreciation
22 for the efforts the Court has done. However, I must raise this
23 question. Certainly, my initial concern with the government's
24 myriad additional conditions was a question in my own mind of
25 why this defendant. This Court certainly does not sit in a

1 vacuum as neither does counsel. Both this Court, the
2 government and counsel, have participated in hundreds if not
3 thousands of sentences where individuals who have been
4 sentenced by this Court and other judges within this court
5 have never had to even consider these kinds of additional
6 conditions.

7 THE COURT: I have sentenced people many times to the
8 halfway house in Brooklyn. I have visited it personally to
9 satisfy myself that they really are geared to helping people
10 reenter into the population.

11 MR. QUIJANO: I appreciate that.

12 THE COURT: I don't think this is the first time I am
13 considering this.

14 MR. QUIJANO: I am not suggesting that, but what I
15 think, what the Court does need to consider is who this 28
16 year-old man is today, not the 16 year-old boy who committed
17 this conduct and hasn't he earned at least the opportunity to
18 show the probation department, the Court the government and
19 all concerned that he can readjust to society under the usual
20 guidelines and supervision afforded by supervised release? Is
21 there really a record at this point in terms of his most
22 recent his story?

23 THE COURT: His most recent history is he has been
24 incarcerated.

25 MR. QUIJANO: That is correct and there are four

1 minor instances of difficulty.

2 THE COURT: Four minor instances but he has not been
3 able to live in the prison population without incurring these
4 instances.

5 MR. QUIJANO: None of them were violent related.
6 They dealt more with refusing an order. Certainly, that is
7 not akin to the type of history that --

8 THE COURT: Does he have any employment?

9 MR. QUIJANO: Your Honor, he has a place to stay with
10 his family. He certainly seeks employment. He seeks to go
11 back to school. All of these can be monitored by the usual
12 type of supervision.

13 THE COURT: We are going to give him the benefit to
14 have an opportunity to have these folks who do a wonderful job
15 there actually send him out to prospective employers.

16 MR. QUIJANO: Why can't they do that under normal
17 supervision?

18 THE COURT: Because I think he needs rehabilitation.
19 Does the government have anything to say about this because
20 you didn't know I was thinking about this either?

21 MS. RESNICK: Yes, we think it is a very useful idea
22 to have restrictions as we have requested in our papers -- not
23 in this form -- to have restriction on this defendant upon his
24 release from jail. Specifically in addition to what
25 Your Honor has suggested, which should provide monitoring and

1 structure, which is what the government is seeking, there were
2 two particular conditions: The condition that this defendant
3 be prohibited from possessing a weapon, including specifically
4 a knife, and a consent to search, so probation can do
5 reasonable searches. The only thing I would like to add is
6 that we have to have a victim statement. We would like to
7 have an opportunity to explain to the Court at the appropriate
8 time before the imposition of sentence.

9 THE COURT: That is your entitlement. Which comes
10 first? I guess I should hear the victim statement before I
11 hear from Mr. Nelson. Mr. Nelson will be the last person to
12 speak.

13 MR. NEUMAN: If I understand Your Honor correctly,
14 you have considered a couple of different places for the
15 community center. Have you chosen one or is that -- I am just
16 wondering logistically, are you delegating that decision?

17 THE COURT: No. The placement will be up to the
18 Bureau of Prisons through their community correction center
19 facilities. I am going to recommend the New Jersey facility
20 because they have these special skills there in terms of life
21 skill opportunities. Let's face it, when he gets out of jail
22 everybody wants Mr. Nelson to make a proper adjustment. It is
23 important that when he gets out of jail he has the best
24 rehabilitative opportunity so he can live peacefully with
25 himself and society. That is a concern I have in terms of

1 sentencing rehabilitation. That is one of the essential
2 aspects of sentencing. I am concerned about that.

3 All right. Enough said about that. At this time I
4 think we can listen to the victim impact statement.

5 MR. QUIJANO: Should we sit?

6 THE COURT: Who is going to speak?

7 MS. RESNICK: Mrs. Fay Rosenbaum, Mr. Rosenbaum's
8 mother, on behalf of family.

9 THE COURT: Maybe we can make a little room, a little
10 comfort room.

11 MR. QUIJANO: May we sit?

12 THE COURT: Yes.

13 THE COURT: Mrs. Rosenbaum, do you wish to sit or
14 stand or however, make yourself comfortable. The courtroom is
15 yours.

16 MRS. FAY ROSENBAUM: I will stand. Thank you,
17 Your Honor.

18 Your Honor, I wish to thank you for the opportunity
19 to speak here today. This is the twelfth anniversary to the
20 day of the death of my son Yankel that resulted from the
21 wounds inflicted on him by Lemrick Nelson. I trust that what
22 I am about to say on behalf of my husband and family will be
23 of assistance to Your Honor in determining a just sentence for
24 Lemrick Nelson.

25 Much of what I am now about to say to you I said

1 previously to His Honor, Judge Trager, when he sentenced
2 Lemrick Nelson on 31 of March 1998 for violating Yankel's
3 civil rights on exactly the same charge as he was again
4 convicted of at the conclusion of the recent trial presided
5 over by Your Honor. Although, almost five and a half years
6 has elapsed since I addressed Judge Trager, what I said to him
7 is even more relevant today as I stand before you.

8 Although unable to attend the latest trial
9 personally, with the assistance of my son Norman who did
10 attend each and every day, my husband and I closely monitored
11 its progress, and most importantly, the verdict of the jury.
12 Similarly, we have carefully reviewed the papers submitted to
13 you by both the government and the lawyers to the defendant.

14 I will never be able to adequately express the
15 enormity of the loss that has been suffered by and continues
16 to be suffered as a result of the murder of my son Yankel.
17 This is a loss experienced not only by me as his mother and by
18 my husband Max, Yankel's father, but indeed, by all who ever
19 came into contact with Yankel -- be they family, friends,
20 academic colleagues or business associates.

21 Yankel left a positive and indelible impression upon
22 everyone whom he met. The true extent of how much this is so,
23 I have only come to learn of and appreciate following his
24 death. Indeed, this is an ongoing learning process that
25 continues to this very day, twelve years after his murder --

1 with people, often total strangers, telling us for the first
2 time of their very positive experiences and encounters with
3 Yankel.

4 To my husband and I, Yankel was a devoted son who,
5 since he was a teenager, he literally cared for our every
6 need, irrespective of how mundane that may have been --
7 nothing seemed too trivial or too much for him and our
8 well-being was always his first concern -- paramount. Indeed,
9 we relied on Yankel's assistance in every way, particularly
10 since my husband and I began to experience illness and
11 infirmities of age. This was so even when he was here in New
12 York. Not a day went by without receiving from Yankel a phone
13 call or a fax. From so far away, somehow he still managed to
14 ensure that our every need was attended to. I remember as if
15 it were only this morning, his words that he would always be
16 there for my husband and me, "whenever and wherever," and that
17 the 12,000 mile distance between him here in New York and us
18 in Melbourne was no obstacle as far as he was concerned -- but
19 that, Your Honor, was our Yankel. He was a do-er.

20 Challenges brought out the best in him. The
21 sensitivity, compassion, was complemented by his inherent
22 determination, commitment and principles. Yankel enjoyed life
23 and longed to see others enjoy life at least to the same
24 extent, but if he saw someone required help, he did not wait
25 to be asked for his assistance. He had initiative and he took

1 the initiative. And it is the contributions he made -- to his
2 family and friends -- in academia and business that are so
3 sorely missed in the wake of his murder, by all who knew him.

4 To his older brother Norman, Yankel was his best
5 friend. My husband and I are proud of both our sons, and most
6 of all, because of the manner in which they truly cared for
7 each other -- without hesitation or reservation.

8 Norman's wife Ettie was more of a sister than a
9 sister-in-law to Yankel, and nothing shown more brightly in
10 Yankel's life than his three nephews.

11 The diversity of the many people Yankel knew who
12 considered him a good friend, a true friend, someone you could
13 always rely on, typified the real Yankel, a person who took
14 people as he found them irrespective of race, creed or color,
15 who did not concern himself with another's background or
16 pedigree, education or worldly possession and liked you for
17 who you are, not for what you are, or what you have.

18 For those he chose not to befriend he, nonetheless,
19 respected. I vividly remember his absolute abhorrence of
20 discrimination of any kind, his unqualified defense of the
21 oppressed and down trodden, and his inflexible principles of
22 fairness, equality, truth and justice. That was the real
23 Yankel Rosenbaum that Lemrick Nelson would have found had he
24 bothered to seek, had he not vented his putrid violent hate
25 -- calling for Yankel's cold blooded murder and carrying it

1 out with no regard or respect for Yankel the person, but with
2 a blind baseless bigotry aimed at what Yankel was -- a Jew.

3 Arguably the single most important example of these
4 principles practiced by Yankel is to be found in Yankel's
5 identification of Nelson as his stabber. As you heard in
6 uncontradicted evidence, that identification of
7 Lemrick Nelson was made by Yankel was immediate and precise
8 -- direct and without qualification. His family and all those
9 who new Yankel always knew that his identification of
10 Lemrick Nelson was made by him without any doubt. Yankel
11 would never have accused anybody of anything unless he was one
12 hundred percent certain.

13 Lemrick Nelson has continuously and consistently lied
14 and denied over an eleven and a half year period of stabbing
15 Yankel, but this lie is only one of the litany of lies that
16 Nelson has told in a pathetic attempt to escape responsibility
17 for his cowardly and vicious attack on Yankel that resulted in
18 his murder. As late as during this trial, Lemrick Nelson
19 without compunction blatantly lied to Your Honor when on the
20 5th of May, year 2003 and that was after Your Honor had
21 specifically and clearly cautioned him that if he lied to you,
22 you would recommend that he be prosecuted for perjury or
23 rendering a false statement. Despite that warning from
24 Your Honor, responding to questioning from Your Honor under
25 oath

1 Lemrick Nelson said in relation to his State murder trial
2 which was conducted in September and October of 1992, that "he
3 told Arthur Lewis that he had stabbed Yankel Rosenbaum."

4 Excuse me.

5 THE COURT: Take your time. If you wish to take a few
6 moments, by all means, compose yourself. You can do that. Do
7 you want to take a moment?

8 MRS. FAY ROSENBAUM: Yes, just a minute.

9 (Pause in the proceeding)

10 Regarding Mr. Trevor Headley who, together with
11 Ms. Christine Yaris, represented him at the first civil rights
12 trial early 1997, in response to your direct question
13 "You are telling me now under oath that you told Mr. Headley
14 that you did stab Yankel Rosenbaum?" Lemrick Nelson replied,
15 "Yes, Your Honor, before the trial he asked me whether or not
16 I stabbed him, I said yes."

17 Yet, Your Honor, on March the 31, 1998, more than a
18 year after Lemrick Nelson maintains he admitted stabbing
19 Yankel to Mr. Headley, and over six years after Nelson says he
20 had likewise admitted stabbing Yankel to the late
21 Arthur Lewis, the lawyer who had defended him at the State
22 murder trial in 1992, at his sentencing before Judge Trager,
23 on the 31st of March 1998, after having been asked by His
24 Honor whether he had anything he wanted to say, he turned to
25 me as I sat in the public gallery of the court next to my

1 husband and son and said:

2 "Mrs. Rosenbaum, I sympathize with you for the loss
3 of your son, but I didn't have no actions. I had no part in
4 it. Even though I have been found guilty of this crime, I'm
5 like a scapegoat."

6 That was a lie. All lies. Lemrick Nelson by his very
7 own admission did stab Yankel. His actions resulted in the
8 cold blooded murder of my son. Lemrick Nelson amongst the mob
9 who violently attacked Yankel as you heard in evidence, to you
10 the call of "There's a Jew, get the Jew, kill the Jew" played
11 the principal part.

12 As for Nelson's expression of sympathy, just another
13 lie. Then, as now, Lemrick Nelson has not and has never been a
14 scapegoat. Far from it. He's a vicious and callous racist
15 murderer, whose contempt for the law, the justice system and
16 indeed, for you, Your Honor, not to mention Yankel and our
17 family, knows no bounds, as neither does his criminality,
18 which is amply demonstrated by the lies he tells whether or
19 not under oath.

20 I, together with my husband and family, look forward
21 to Your Honor's recommendation that Lemrick Nelson be
22 prosecuted for perjury or rendering a false statement for the
23 lies he told you under oath.

24 I note from the transcript of the proceedings of the
25 next day after Nelson had told those lies to Your Honor, that

1 his counsel, Mr. Neuman, told you that Mr. Headley had told
2 him that he had learned that Nelson had admitted the stabbing
3 of Yankel to at least his mother. How ironic. How pathetic,
4 for it was his mother who came to me in the court immediately
5 after Judge Trager had passed sentence 31 March 1998, and in
6 front of my family and friends vehemently protested her son's
7 complete and absolute innocence of any wrongdoing.

8 I have no doubt Lemrick Nelson will be paraded before
9 you today and lauded by his lawyers as a changed person -- not
10 the 16 year-old teenager who wielded a knife emblazoned with
11 the word "killer" stabbed my and murdered my son Yankel.
12 Changed, maybe, but only for the worse, as his lies as the 27
13 and a half year-old clearly bears testimony to.

14 Yankel's loss is forever with me and my husband, and
15 indeed, all of those who loved Yankel. Gone is his infectious
16 sense of humor, his sense of fun, his good nature and placid
17 disposition. There is a profound everlasting numbness about
18 it all, an unreal feeling, totally unnatural, which has only
19 increased over time.

20 Deaths through accidents and illness are,
21 unfortunately, part of life and have always been so, although
22 I doubt that makes the loss of a child any easier to cope
23 with. The murdering of Yankel, the consummate innocent
24 victim, cannot be reconciled.

25 Children eulogize parents, not the other way around.

1 It is not right. It will never be right and it can never be
2 right. Time simply does not heal. There is no such thing as
3 closure. There never can be. Yankel's loss will remain
4 forever.

5 Yankel is missed in some different ways by all those
6 who knew him. His many contributions, large and small, public
7 and private are no longer, and have not been replaced.

8 It is, however, the things that are more often taken
9 for granted which are constant reminders of Yankel's murder
10 and the loss it has brought. His place at the Shabbos table
11 remains empty when the family assembles for Pesach, Passover,
12 and the New Year Yankel is not there.

13 The academic work he commenced that brought him to
14 New York, today remains unfinished only because the underlying
15 theory and research was Yankel's own original work. His
16 friends talk about the void his murder created, which remains
17 in all our lives.

18 We do have memories, good memories of Yankel, but
19 they are too few by virtue only of the shortness of his life,
20 a good and productive life, cut down ever so tragically by
21 Lemrick Nelson who lacked the very qualities of character and
22 honesty which he destroyed.

23 There has been no apology from Lemrick Nelson for
24 Yankel's murder. No remorse. Nothing. Just lies. There is
25 nothing Lemrick Nelson can ever say that could ever be of any

1 comfort to me or my family. He has shown himself to be a
2 pathological liar of criminal proportions.

3 Nelson's actions have taken Yankel away, away from
4 his family, friends and society. While Nelson's family and
5 friends will always be able to visit him and be with him
6 irrespective of the sentence passed. My husband and I,
7 Yankel's family and friends, are left with only to visit a
8 grave.

9 My husband and I had our lawyers submit to you a
10 legal brief detailing why it is we believe that you have the
11 authority to imprison Nelson for life. We read closely your
12 comments in response to questions received from the jury
13 during their deliberations describing them as being muddled,
14 confused and a little bit out of touch with their
15 responsibilities in terms of following your instructions on
16 the law. Comments I believe that are even more befitting
17 their answer to the question posed on the verdict sheet after
18 they had found Nelson guilty of the charge of the indictment,
19 which included that the death of Yankel Rosenbaum did result
20 from Nelson's actions. The jury had ignored evidence and not
21 acted in accordance with their oaths and certainly not in
22 accordance with your instructions and directions. The report
23 in the New York Times have comments of the jury forewoman
24 referred to in the papers submitted to you by the government
25 only confirmed what was already patently obviously.

1 How disturbing that according to the papers lodged by
2 the defense lawyers this jury forewoman contacted them on two
3 occasions, but according to my inquiries, never demanded a
4 retraction from the New York Times, who stand by the complete
5 accuracy of that report, nor did she contact the government.
6 For that matter, I cannot understand why she did not contact
7 you, or did she? I am not expecting an answer from you,
8 Your Honor.

9 Sometimes juries, as this one, as far as the answer
10 to their question on the verdict sheet after finding Nelson
11 guilty is concerned, fail the justice system and the victims
12 of crime. I am not a lawyer, nor is my husband, but the legal
13 brief filed with you on our behalf sincerely places before you
14 in legal terms what we as lay people recognize from our
15 reading of the verdict sheet and the charge in the indictment.
16 My husband and I implore you to adopt that detailed in the
17 brief. Do not let this misguided
18 jury undermine you, the court, and true justice in this case.

19 Once again, I thank you, Your Honor, for this
20 opportunity to speak here today. My husband and I and our
21 family trust you impose a sentence on Lemrick Nelson which
22 represents true justice reflecting the enormity of his crime
23 and ensuring that a clear unequivocal message is sent. The
24 justice system will not tolerate crimes of the nature
25 committed on Yankel which ended his life nor will it stand

1 idle to be misused and abused.

2 THE COURT: Thank you, Mrs. Rosenbaum. We will stand
3 in recess for five minutes and then I will hear from
4 Mr. Nelson.

5 Thank you, for your thoughts.

6 (Court recessed.)

7 (Court resumed.)

8 THE COURT: Do you want to comment before we call upon
9 Mr. Nelson, Ms. Resnick?

10 MS. RESNICK: Yes. Briefly, Your Honor, the
11 government requests that the Court, most respectfully, impose
12 a statutory maximum in this case permissible under the law.
13 Based on the jury's verdict, the defendant in this case
14 attacked and brutally killed a completely innocent man, a man
15 that he knew to be innocent simply because Yankel Rosenbaum
16 was an Orthodox Jew. Now, as you have just heard, the
17 Rosenbaum family has suffered a tragic and irreversible loss.
18 This is a crime and Your Honor has received submissions to
19 this effect that created victims throughout this city. Because
20 hate crimes victimize all the members of the targeted group
21 and the particularly random and brutal way that
22 Yankel Rosenbaum was attacked by this defendant and others in
23 this case left a lasting impact on the Orthodox Jewish
24 community in this city. I don't know what the defendant may
25 say to the Court now but he is far from a changed man, from

1 the man he was when he took his knife and plunged it into
2 Yankel Rosenbaum, taking his life. This is a defendant who
3 has continued over the last 12 years to perpetrate his lies as
4 recently, as Your Honor has found and confirmed here today, at
5 the last trial just a few months ago, in the 12 years since he
6 committed this crime this defendant has been lying to courts,
7 he has lied to juries and he has lied to the mother of his
8 victim. He has tried to avoid responsibility for his crime by
9 defaming the police officers who participated in his arrest
10 and investigation by defaming his prior attorneys, one of whom
11 is now deceased, and many others along the way. Despite
12 whatever the defendants says to the Court here today, he has
13 shown an utter lack of remorse and a smug sense of
14 indignation, despite the fact that
15 Yankel Rosenbaum, a young man, died of wounds inflicted by his
16 hand.

17 As Your Honor know from submissions from the
18 presentence report and the government submissions, this is the
19 defendant who in the time that he has been incarcerated since
20 the commission of this crime, has continued to commit crimes
21 of violence and possess knives and similar weapons on similar
22 occasions, since the commission of this repugnant crime. For
23 all these reasons and considering the statement -- the victim
24 impact statement and the facts and evidence that came before
25 Your Honor, we ask you to upwardly depart based upon the death

1 of Yankel Rosenbaum and impose the statutory maximum in this
2 case.

3 THE COURT: All right. Anybody else wish to say
4 anything before I call upon Mr. Nelson? Mr. Nelson, now you
5 have the right to speak before sentence is imposed. You,
6 obviously, have heard everybody speak here and you know what
7 my thoughts are to some extent in terms of upward departure
8 situation and the type of sentence that I think perhaps would
9 be useful to you as well as accomplish the type of sentencing.
10 Without saying anything more, this is your opportunity to
11 speak if you choose to do so.

12 THE DEFENDANT: Well, first to the Rosenbaum family,
13 I like to apologize for my participation on the attack of
14 Yankel Rosenbaum August 19. I was a 19 year-old -- I mean a
15 16 year-old who made a terrible mistake which eventually led
16 to the unfortunate, untimely and needless death of an innocent
17 and harmless man. I know there is no excuse for what I did to
18 Mr. Rosenbaum. If there is anything I can or if there is
19 anything I could do to bring his life back, believe me, I
20 would do it in a heart beat. I would never expect their
21 forgiveness. I know there is nothing I can do or say to
22 relieve the pain I have inflicted. It may be hard for you to
23 believe this after all that has transpired in the past decade,
24 but I give you my deepest and sincerest apologies for putting
25 you through these litigation and the attack on your beloved

1 Yankel.

2 Second, I want to appeal just to my family for the
3 stress and pain and disappointment I have put them through.
4 My family has brought me up in a way that should never --
5 should never have resulted in my actions on August 19.

6 Finally, Your Honor, during my incarceration I have
7 learned to appreciate a lot of things in life which may be
8 beneficial to me and help me become a better life than the
9 life I was living in the past. I am 28 year-old man who has
10 been give plenty of time to think about what has happened to
11 Yankel Rosenbaum. Now I'd like to move on with my life and
12 put the past behind me, for the only thing I may use is the
13 lesson I learned from my mistakes that helps me become a
14 better man instead of a belligerent young man. In doing so, I
15 want Your Honor to know that there is not a day that goes by
16 that don't think and I remember that Mr. Rosenbaum lost his
17 life unnecessarily and I realize that is something that I have
18 to carry with me for the rest of my life.

19 THE COURT: All right. Mr. Nelson, first, on the
20 issue of upward departure, the Court will upwardly depart. I
21 suspect that does not come as a surprise to you and your
22 counsel, since I have put everybody on notice before and I
23 have articulated my concerns I think clearly enough, but
24 specifically, in terms of law that I am obliged by my oath of
25 office to comply with. Whether I may or may not agree with it,

1 I am bound to comply with the law.

2 There is a maximum of ten years that I am constrained
3 to address in terms of the upward departure but I will
4 upwardly depart to the maximum. I find in the exercise of this
5 sentencing that the role -- that your actions on August 19th,
6 1991 did result in Yankel Rosenbaum's death.

7 That is, as I told the jury, I now find that the
8 death was an actual and foreseeable consequence of the acts
9 committed by you. I make this determination not simply by the
10 preponderance of the evidence. I think that would trivialize
11 the seriousness of what occurred on that night, but by clear
12 and convincing evidence.

13 The verdict of this jury was the same as the verdict
14 before Judge Trager in terms of the determination by the jury
15 that you committed the crime of the violation of
16 Mr. Rosenbaum's civil rights. What was different, of course,
17 is that the cause of the intervening decision of the United
18 States Supreme Court in the case, Apprendi versus the United
19 States, the issue of whether death resulted was no longer a
20 matter left to the discretion and the determination of the
21 sentencing judge. We respect the decision of the United
22 States Supreme Court, obviously, and because of that, the jury
23 had to make the determination. Here the jury has made its
24 determinations. I now make my determinations in terms of the
25 parameters of sentencing and based upon everything I have

1 heard and everything I know about this case, this represents a
2 modest upward departure. If allowed, I would have undoubtedly
3 departed more so. Let me also say that, regardless of
4 obstruction of justice, and you know how I have come to rest
5 with the so-called McKeon hearing, even if there were no
6 so-called adjustment, I would, nonetheless, have upwardly
7 departed, having made the finding that death resulted as a
8 result of your acts, to the maximum of ten years. As I
9 mentioned to Mr. Quijano, upward departure is clearly
10 indicated here because all we have to go on based upon the
11 jury's verdict is the aggravated assault which simply does not
12 factor in the death of the victim. I want to be clear about
13 that legally in terms of trying to explain to you as best as I
14 can the rationality and reasons for the Court's sentence.

15 Now we come to the issue of what kind of conditions
16 to impose upon you with respect to supervised release. I am
17 going to impose three years of supervised release. That is
18 the maximum that I can impose under the law, just like ten
19 years or 120 months of incarceration is the maximum I can
20 impose under the law. But it is important now that we address
21 your future life, because you have a future life, unlike
22 Mr. Rosenbaum, and it is important for society to have as much
23 comfort as possible that when you return to society, that you
24 be able to live in harmony and peace with society as well as
25 with yourself and hopefully, you will be able to do some good

1 deeds and I really have no idea of how that will work out.

2 That's something that's really personal to you.

3 But nonetheless, the following conditions of
4 supervised release will be imposed by me:

5 First, the obvious of course is that you will not
6 possess any weapons, including knives, razors, box cutters, or
7 any sharp edged weapons. In that respect, I am aware of the
8 problem you had down in Georgia after the jury found you not
9 guilty on the state charge and you know what I'm talking
10 about, so you just cannot do that. If you violate any of these
11 conditions of supervised release, I am sure your lawyers have
12 told you, if not I will say this again, that you will be
13 subject to a violation proceeding and certainly you will be
14 exposing yourself to additional periods of incarceration.

15 I think the law requires a maximum of two years if
16 that happens, but we are not dealing with that right now.

17 MS. RESNICK: I believe it is three years.

18 THE COURT: It is three years. You can be sentenced
19 to three years.

20 MS. RESNICK: It is a three-year period of supervised
21 release.

22 THE COURT: It may be two years, it may be three
23 years, but we are not dealing with that here. It is important
24 that Mr. Nelson realize that he could face additional
25 incarceration for violation of these conditions of supervised

1 release which I am imposing. There will be also a condition
2 for you to be provided with mental health treatment because
3 that's going to aid you in your rehabilitation. I think you
4 need that type of help. Your criminal history, including the
5 instant offense, indicates that you are prone to becoming
6 angry and volatile and when in such a state you can be
7 physically dangerous to those around you, and once again, I am
8 talking about what happened down in Georgia. Clearly, I
9 believe you need help with this problem so, therefore, while
10 under supervision you will participate in the mental health
11 treatment program or programs. The treatment provided will be
12 selected by the probation officer in charge of your probation
13 supervision and such treatment can include inpatient as well
14 as outpatient.

15 You will pay the costs of that if you are financially
16 able to do so and that is something which we cannot determine
17 at the present time.

18 I am not going to fine you because you don't have the
19 ability to pay a fine even though I think that there is a
20 hopeful possibility that you will be employable in the future,
21 but I don't see any wherewithal in the near future for you to
22 be able to pay any fine.

23 There is a a \$50 special assessment that is required
24 by law, and I am also going to impose as an additional
25 condition of supervised release a search condition as follows:

1 That you shall submit your personal residence, place of
2 business, vehicle or any other premises under your control, to
3 a search, on the basis if the probation officer has reasonable
4 belief that contraband or a violation of the conditions of the
5 release may be found. The search must also be conducted in a
6 reasonable manner and at a reasonable time. Failure to submit
7 to a search may be grounds for revocation, and you are to
8 inform any residents that the premises may be subject to
9 search pursuant to this condition.

10 I'm also going to provide as a condition of
11 supervised release, in addition to the prohibition against the
12 weapons that I described, prohibition for the possession of a
13 firearm, and an additional condition of supervised release
14 will prohibit you from partaking of any illicit drugs, and I
15 would say alcohol as well, since you have told the Court that
16 you are inclined to drink and that was, of course, part of
17 your defense, that you were inebriated or how your ability to
18 understand what was happening was impaired because of the
19 heavy consumption of alcohol.

20 The last condition of special conditions of
21 supervised release will be, as I have explained to
22 Mr. Quijano, a period of nine months in community confinement
23 center -- we call that a halfway house also or a comparable
24 facility -- and in that respect I just want to inform the
25 lawyers and everybody about the legal aspects, so that you

1 will have a clear understanding that I have carefully
2 considered whether I have the authority under law that I can
3 do that. I am satisfied I do have the authority. I think nine
4 months is an appropriate period of time for you to be in
5 community confinement. You should be given sufficient time to
6 seek employment and to ultimately maintain gainful employment.
7 I recommend, though it is up to the Bureau of Prisons to
8 implement my recommendation, that you be placed in the
9 comprehensive sanction center in Newark, New Jersey which has,
10 as I have explained, the most comprehensive and intensive
11 service to help rehabilitate offenders.

12 In making this determination I have already explained
13 to you why I think for rehabilitation purposes this is
14 separate and apart from imprisonment. This has nothing to do
15 with the ten-year maximum, but under the law, specifically
16 section 5F1.1 of the sentencing guidelines, it provides that
17 community confinement may be imposed as a condition of
18 probation or supervised release. That contrasts with section
19 5F1.2 dealing with home detention, which provides that home
20 detention may be imposed as a condition of probation or
21 supervised release, but only as a substitute for imprisonment.

22 I have carefully considered whether I have the
23 authority since dealing with a ten-year maximum to impose this
24 condition of supervised release for the purposes of
25 benefitting you with rehabilitation and I am satisfied I do.

1 There are two cases which I will advise you of right now which
2 I rely upon, the Ninth Circuit decision in the year 2000 U.S.
3 versus Bahe 201 F.3d 1120, and then there is a Seventh Circuit
4 decision which clearly addresses the issue of whether
5 supervised release can accommodate a community confinement
6 scenario, notwithstanding the fact that you are dealing with a
7 maximum period of incarceration, and the Seventh Circuit in
8 Elkins answers that question in the affirmative. The Second
9 Circuit has not spoken on the issue but I think it is clearly
10 indicated here. The Seventh Circuit citation is 176 F.3d 1016.
11 I hope you will take advantage of the opportunity that I am
12 providing for you to have this period of rehabilitation, and
13 these people are capable of getting you employment or
14 assisting you. You will have the opportunity to show to the
15 people who run the community center that you really, truly are
16 bent on rehabilitating yourself, that you truly are bent on
17 getting proper employment and making your best efforts to put
18 your money, so to speak, where your mouth is. So this is an
19 opportunity for you and I think that is a proper sentence.

20 I think that pretty much concludes everything except
21 that we have general conditions of supervised release which
22 Mr. Innelli is handing you. Read them. You must comply with
23 them also. There are fourteen of them and if you fail to
24 comply with those general conditions, as if you would fail to
25 comply with a special condition, well, then, you will have to

1 be mindful of the fact that you can be cited for violation of
2 the conditions of supervised release and you will have to come
3 before me or some other judge if I am not available and answer
4 to the Court. As I have told you, you can be subject to
5 additional periods of incarceration.

6 Now, the sentence I have imposed upon you satisfies
7 at least two of the bases for sentencing set forth in our law.
8 I find that it is appropriate to reflect the seriousness of
9 the offense, to promote respect for the law, and to provide
10 just punishment for the offense, and also, to provide you with
11 necessary rehabilitation.

12 If your attorney wants to make a comment now?

13 MR. QUIJANO: Your Honor, in the Court's earlier
14 comments when it was discussing community confinement, it
15 referred to a period of time, about six months, and indeed,
16 that is consistent with application note 2 of 5F1.1 which
17 suggested generally should not impose a period in excess of
18 six months.

19 THE COURT: Mr. Quijano, I would think that you would
20 be happy with the fact that the Court is imposing nine months
21 to give him an added opportunity to get the needed structure
22 and rehabilitation that he needs. We are speaking
23 rehabilitation, we are not speaking punishment.

24 MR. QUIJANO: Which obviously I am in total support.
25 However, as I stated before, I don't think this is the kind of

1 structure which is necessary. Therefore, I would ask that the
2 Court impose what is recommended in 5F1.

3 THE COURT: I have considered that but I think nine
4 months is more appropriate. Look, arguably if I wanted to be
5 punitive I could say a year, a year and a half. I am not
6 doing that.

7 MR. QUIJANO: We are not suggesting that the Court
8 is.

9 THE COURT: I just want you to be aware that I have
10 painfully examined what the facilities are all about and
11 painfully considered what a proper rehabilitation period is.
12 Sometimes people view community confinement as the equivalent
13 of punishment. It is not designed to do that. It is designed
14 for rehabilitation. Your client, Mr. Nelson, is sorely in
15 need of every opportunity we can provide to help him
16 rehabilitate himself. In my opinion that condition includes
17 the sentence.

18 First I want to advise you, as I am obliged to under
19 the law, as to your right to appeal. The attorneys are well
20 skilled, outstanding members of the bar and they know. You
21 will have to file a notice of appeal within ten days from the
22 date that I enter judgment from that period of time. There
23 will be a written judgment from that period of time, and they
24 will be able to perfect it thereafter, if they choose to
25 appeal. They will advise you of all of your appellate rights.

1 Now, I want to conclude the sentence. I have thought
2 for days and days and days what, if anything, I should say. I
3 knew I had to say a lot in order to get to the sentence, which
4 I have just announced, and I went back and forth should I say
5 anything else, should I not say anything else, but last night
6 something came to me which I thought, hopefully, will be
7 useful to everybody, and then I saw today in the newspaper
8 that the Rosenbaum and the Cato family got together and I was
9 heartened to see that.

10 So we grieve the loss of Gavin Cato and
11 Yankel Rosenbaum on the twelfth anniversary of their deaths.
12 One was caused by an accident and the other by horrendous and
13 pathetic acts -- I emphasize the word acts -- of religious
14 and racial bigotry which have no place in any sane society.
15 Regardless, each death represents a tragic loss to their
16 respective families. Recognizing this, they have come
17 together and have shared in each other's pain and grief. By
18 their example, they have given us all hope that some day
19 prejudice and hatred because of one's religion or the color of
20 one's skin will be no more; and neither Gavin nor Yankel will
21 have died in vain.

22 That concludes the Court's sentence.

23 MR. QUIJANO: Thank you.

24 MS. RESNICK: Thank you, Judge.

25 (Proceedings concluded as above set forth.)

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